

**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**(DELHI BENCH 'A' : NEW DELHI)**  
**BEFORE SH. M. BALAGANESH , ACCOUNTANT MEMBER**  
**AND**  
**SH.ANUBHAV SHARMA, JUDICIAL MEMBER**  
**ITA No. 74/Del/2023, A.Y. 2017-18**

Amar Nath C/o. Shiv Narain Amar Nath, Commission Agents, Farukhnagar, Gurgaon, Haryana- 122506 PAN : AAGPN1476P	Vs.	ITO, Ward 1(1), Gurgaon
Appellant		Respondent

Appellant by	Sh. Satish Kr. Gupta, Adv.
Respondent by	Sh. Girish Kohli, Sr. DR
Date of hearing:	28.06.2023
Date of Pronouncement:	10.07.2023

**ORDER**

**Per Anubhav Sharma, JM :**

The appeal has been preferred by the Assessee against the order dated 28.11.2022 of CIT(A)-3, Gurgaon (hereinafter referred as Ld. First Appellate Authority or in short Ld. 'FAA') in appeal no. 10078841/2021-22 arising out of an appeal before it against the order dated 14.01.2022 passed u/s 270A of the Income Tax Act, 1961 (hereinafter referred as 'the Act') by the ITO, Ward 1(1), Gurgaon (hereinafter referred as the Ld. AO).

2. The brief facts of the case are a survey u/s 133A of the Act was conducted on 02.03.2017. The appellant is a commission agent of food grains. During the course of survey proceedings the appellant was found maintaining two sets of books of account - one for income tax purposes and other for

business purposes. It was revealed that the appellant has made out of books sales of Rs. 77,25,354/- which were not recorded in the books of account. On such facts the Ld. AO computed undisclosed profit of Rs. 246438/- @ 3.29% on such out of book sales. Further the Ld. AO made addition of Rs. 9,23,213/- u/s 69A of the Act on account of unexplained deposits in the bank account. Penalty proceedings were initiated u/s 270A r.w.s. 270A(9). During the penalty proceedings it was stated that there was no "element of Mens rea". After considering the facts of the case and explanation of the appellant, the Ld. AO levied penalty of Rs. 80,224/- @ 200% of the tax payable on the undisclosed income. During the appellate proceedings, it was stated that the appellant was eligible for immunity from imposition of penalty u/s 270AA of the Act as additional demand was deposited on 27.01.2020 and no appeal has been filed against the assessment order. Further it was stated that penalty leviable in this case was for Rs. 20,056/- i.e @ 50% of additional tax payable as provided u/s 270A(7) of the Act.

2.1 Ld. CIT(A) observed that;

*“Facts of the case and material on record have been gone through. The case of the appellant is not covered by the provisions of section 270AA of the Act as the AO has initiated the penalty u/s 270A(9) of the Act. Further it is found that the appellant suppressed the sale by Rs. 77,25,354/- from the regular books of accounts and on such suppressed sale the AO has made addition of Rs. 2,46,438/- as a profit earned from such sale. Further the appellant has made deposits in the bank account for Rs. 9,23,113/- whose source could not be explained. Accordingly the AO made addition of Rs. 9,23,113/- u/s 69A of the Act. **Such under reported income are in the nature of misreporting and therefore the case of the appellant falls within the ambit of section 270A(9) of the Act. Therefore it is found that there is no merit in the submission of the appellant. On such facts penalty of Rs. 80,224/- levied by the AO u/s 270A(9) is hereby confirmed. Ground of appeal no. 1 is hereby dismissed.”***

3. Heard and perused the record.

3.1 The assessee is in appeal before the Tribunal raising following grounds :

*“Grounds of appeal. (1). That the order passed by lower authorities is against the principles of natural justice as the appellant is eligible for immunity u/s 270 AA of IT Act 1961 because he has fulfilled the two conditions mentioned in section 270 AA of IT Act 1961.*

*(1). He shall deposit the demand within the period specified in notice. (2). He shall not file appeal against the order passed u/s 143 (3) of IT Act 1961. Both the conditions are fulfilled. So justice may be done by quashing the order by which penalty of Rs. 80224.00 is imposed. Under protest. UNDER PROTEST As per provisions of section 270 A sub section (1) of IT Act 1961. Sub Sec 7, tax on under reported of income was calculated at Rs. 40112.00. So the penalty should be Rs. 20056.00.”*

4. Ld. Counsel for the assessee submitted that the assessee had deposited additional demand of Rs. 10,68,512/- in two deposits of Rs. 50,00,000/- and 5,68,512/- on 27.01.2020 which was within the specified period as mentioned in the notice of demand issued u/s 156 of the Act. Relying provisions of Section 270AA of the Act he submitted that as the demand was settled within the specified period and no appeal against the assessment order was filed the conditions stood complied so assessee was eligible for immunity from imposing penalty.

4.1 It was also submitted that under sub section (7) Section 270A of the Act penalty referred to in sub section (1) shall be a sum of equal to 50% of amount of tax payable on the under reported income. It was submitted that the tax on under reported income is calculated at Rs. 40,112/- so penalty of Rs. 20,056 only could have been levied.

4.2 Ld. Dr however defended the order of Ld. CIT(A) submitting that when the penalty proceedings were initiated u/s 270A(9) of the Act. The same falls under sub section (2) section 270AA as it is the case of under reporting of the income.

5. Giving thoughtful consideration to the matter on record and the submissions. It comes up that admittedly no application was filed before the Ld. AO in terms of Section 270AA while sub section (2) of section 270A provides that application for immunity shall be made within one month from the end of the month in which the assessment order has been received and shall be made in such form and verified to such manner as may be prescribed. Further sub section (3) provides that if the two fundamental conditions about payment of tax demand in the specified period and non-filing of appeal against assessment order are fulfilled, then the assessing officer shall grant immunity from imposition of penalty u/s 270A. Further sub-section (4) of 270AA of the Act provides that Assessing Officer shall within one month from the end of the month in which application is received pass an order accepting or rejecting such application and that no order rejecting that application shall be passed unless the assessee has been given opportunity of being heard. **Most importantly sub section (5) of section 270AA provides that an order of accepting or rejecting such application shall be final.**

5.1 Thus, the provisions of section 270AA of the Act bring out the complete code in itself. It creates substantive right of immunity in favour of the assessee subject to certain conditions, lays down the procedure to be followed by the Assessing Officer and attaches finality to the order passed by the Assessing Officer.

5.2 This section nowhere indicates that the power of granting immunity is available to the first appellate authority. In fact Sub section (6) of Section 270AA provides at no appeal u/s 246A or no revision u/s 264 of the Act will be entertained by Ld. CIT(A) or by Ld. CIT against the assessment order, which has been subject matter of proceedings of immunity and the application has been accepted.

5.3 In the case in hand it transpires that no application was filed before the Ld. AO and during the appellate proceedings, for the first time assessee had claimed that he was eligible for immunity from imposition of penalty u/s 270AA of the Act and Ld. CIT(A) determined the issue against the assessee holding that as the penalty proceedings were initiated u/s 270A(9) of the Act provisions of section 270AA are not applicable. Ld. CIT(A) also gave a finding that it was a case of under reporting of the income in the nature of misreporting, therefore, the case of assessee falls within the ambit of Section 270A(9) of the Act.

6. The Bench is of considered opinion that the ld. First Appellate Authority had no jurisdiction to enter into the question of allowing or rejecting claim of the immunity from imposition of penalty u/s 270AA of the Act. The assessee at first instance had not made an application as per the provisions of Section 270AA of the Act, therefore, there was no order of Ld. AO u/s 270 AA of the Act. Even if it is assumed from the argument of ld. Counsel that challan etc. were submitted before the Ld. AO to claim the relief and it is implied that there was the order of rejecting the claim of immunity, then also the order stood final and which could not have been matter of challenge before Ld. First Appellate Authority.

7. Further the order of ld. CIT(A) shows that assessee had raised following grounds : *“1. The case of the appellant falls within provisions of section 270AA of the IT Act, 1961 and he is eligible for immunity from imposition of penalty and learned assessing officer imposed penalty of Rs. 80,224/-.*

*So, justice may be done by quashing the order by which penalty of Rs. 80,224/- was imposed”*

7.1 At page no. 4 of his order, Ld. CIT(A) has reproduced the submissions of assessee wherein relief in the alternative was sought that in any case the penalty

could be imposed to extent of Rs. 20,056 and not Rs. 80,224/-. That aspect has not been considered and adjudicated by the Ld. CIT(A). Quite likely as no such ground specifically was raised before him. However, before this tribunal in the ground of appeal it is claimed that penalty should otherwise be 20,056/-. In this context Sub-section (3) of Section 270AA of the Act is relevant which provides as follows;

*“The Assessing Officer shall, subject to fulfilment of the conditions specified in sub-section (1) and after the expiry of the period of filing the appeal as specified in clause (b) of sub-section (2) of section 249, grant immunity from imposition of penalty under section 270A and initiation of proceedings under section 276C or section 286CC, where the proceedings for penalty under section 270A has not been initiated under the circumstances referred to in sub-section (9) of the said section 270A.”*

7.2 To consider the question that penalty ought to have been levied at 50% of the additional tax payable as provided u/s 270A(7) of the Act. It appears from the order of Id. AO u/s 270A of the Act that penalty has been levied by invoking the provisions of Section 270A(1) r.w.s. 270(9)(A) of the Act. Though the Ld. AO mentioned that the penalty is being levied @ 200% of the amount of tax payable on the under reported income he has not specifically mentioned that under reported income is in consequence of any misreporting. Ld. CIT(A) however concluded that under reported income was in the nature of misreporting.

8. The Bench is of considered view that as Ld. AO has specifically invoked Section 270(9)(a) of the Act then by virtue of sub section (3) of Section 270AA of the Act, as reproduced above, it has to be considered to be a case of under reported income in consequence of misreporting which creates liability of penalty equal to 200% of the amount of tax payable on under reported income as per sub section (8) of Section 270AA of the Act.

8.1 Nothing has been portrayed in the form of grounds or argued that the case of assessee was of under reporting the income only and no misreporting was involved. In fact, if the merits are considered the case of Revenue against assessee is that he was maintaining two sets of books of accounts which were impounded during the course of survey proceedings and it was found that assessee has made out of books sales amounting to Rs. 77,25,354/- upon which addition on gross profit @ 3.19% of Rs. 77,35,354/- was made. That certainly amounts to under reporting of incoming consequence to misreporting by way of misrepresentation of facts. There is thus no force in the claim that penalty ought to have been levied at 50% of the additional tax payable as provided u/s 270A(7) of the Act.

9. In the light of aforesaid, the grounds raised have no substance, **the appeal of assessee is dismissed.**

**Order pronounced in the open court on 10<sup>th</sup> July, 2023.**

**Sd/-**  
**(M.BALAGANESH)**  
**ACCOUNTANT MEMBER**

*Date:- 10<sup>th</sup>.07.2023*

*\*Binita, SR.P.S\**

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

**Sd/-**  
**(ANUBHAV SHARMA)**  
**JUDICIAL MEMBER**

ASSISTANT REGISTRAR  
ITAT, NEW DELHI